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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-66311; File No. SR-NYSEARCA-2012-07)

February 2, 2012

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Deleting the Text of NYSE Arca Equities Rule 5.2(b)(1) and Adopting New NYSE Arca Equities Rule 5190 that is Substantially the Same as Financial Industry Regulatory Authority Rule 5190

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on January 23, 2012, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delete the text of NYSE Arca Equities Rule 5.2(b)(1) and adopt new NYSE Arca Equities Rule 5190 that is substantially the same as Financial Industry Regulatory Authority (“FINRA”) Rule 5190. The text of the proposed rule change is available at the Exchange, the Commission’s Public Reference Room, and [www.nyse.com](http://www.nyse.com).

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included

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<sup>1</sup> 15 U.S.C.78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to delete the text of NYSE Arca Equities Rule 5.2(b)(1) and adopt new NYSE Arca Equities Rule 5190 that is substantially the same as FINRA Rule 5190.<sup>4</sup> The proposed rule change will further harmonize the Exchange's rules with the rules of FINRA, NYSE, and NYSE Amex. The Exchange believes the proposed rule change will help reduce duplicative reporting requirements for ETP holders who are also FINRA members and/or NYSE or NYSE Amex member organizations, because ETP Holders will not be required to submit an additional Regulation M notification to the Exchange if they have already provided a notification to FINRA, NYSE, or NYSE Amex pursuant to their respective rules.

Background

NYSE Arca Equities Rule 5.2(b)(1) requires ETP Holders that act as a lead underwriter of an offering to notify the Exchange of such offering in the form and

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<sup>4</sup> See Securities Exchange Act Release No. 58514 (September 11, 2008), 73 FR 54190 (September 18, 2008) (SR-FINRA-2008-039). The Exchange's affiliates, New York Stock Exchange LLC ("NYSE") and NYSE Amex LLC ("NYSE Amex"), previously adopted versions of FINRA Rule 5190; See Securities Exchange Act Release Nos. 59965 (May 21, 2009), 74 FR 25783 (May 29, 2009) (SR-NYSE-2009-25) and 59975 (May 26, 2009), 74 FR 26449 (June 2, 2009) (SR-NYSEALTR-2009-26).

manner as required by the Exchange, including the information specified in the rule. NYSE Arca Equities Rule 5.2(b)(1) covers the same material as FINRA Rule 5190, which was adopted to consolidate certain Regulation M-related notification requirements and applies uniformly to distributions of listed and unlisted securities.<sup>5</sup> FINRA Rule 5190 imposes certain notice requirements on members participating in distributions of listed and unlisted securities, and is designed to ensure that FINRA receives pertinent distribution-related information from its members in a timely fashion to facilitate its Regulation M compliance program. FINRA recently amended FINRA Rule 5190 to clarify members' notice obligations under the rule.<sup>6</sup> NYSE and NYSE Amex Equities each adopted a version of FINRA Rule 5190 for their respective markets, which incorporate all of the elements of FINRA Rule 5190 plus add Exchange-specific notification requirements in NYSE and NYSE Amex Equities Rules 5190(e).

Pursuant to a regulatory services agreement, FINRA performs certain regulatory services on behalf of NYSE Arca, NYSE, and NYSE Amex, including review of Regulation M-related notification requirements under NYSE Arca Equities Rule 5.2(b)(1), NYSE Rule 5190, and NYSE Amex Equities Rule 5190. Under the current rule and as provided for pursuant to NYSE Arca Equities Rule 0, all notifications to the Exchange under NYSE Arca Rule 5.2(b)(1) are submitted directly to FINRA. Accordingly, when a common member of NYSE Arca and FINRA or common member of NYSE Arca and NYSE and NYSE Amex equities have Regulation M-related notification requirements, FINRA receives two submissions from that same common

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<sup>5</sup> See Securities Exchange Act Release No. 58514 (September 11, 2008), 73 FR 54190 (September 18, 2008) (SR-FINRA-2008-039).

<sup>6</sup> See Securities Exchange Act Release No. 62970 (September 22, 2010), 75 FR 59771 (September 28, 2010) (SR-FINRA-2010-037).

member – one notification pursuant to NYSE Arca Equities Rule 5.2(b)(1) and a separate Rule 5190 notification that meets the requirements of FINRA Rule 5190, NYSE Rule 5190, and NYSE Amex Equities Rule 5190. The content of these notifications is substantially the same, albeit in different formats.

#### Proposed Rule Change

The Exchange proposes to harmonize its Regulation M-related notification rules with the rules of FINRA, NYSE, and NYSE Amex Equities both to provide uniformity in the marketplace as well as to reduce duplicative reporting obligations for the same subject matter. Accordingly, the Exchange proposes to adopt NYSE Arca Equities Rule 5190, which is based on both FINRA Rule 5190, and NYSE and NYSE Amex Equities Rule 5190.

Similar to NYSE Arca Equities Rule 5.2(b)(1), proposed NYSE Arca Equities Rule 5190 would require, in part, that an ETP Holder acting as a manager (or in a similar capacity) of an offering to provide the following information:

- the ETP Holder's determination as to whether a one-day or five-day restricted period applies under Rule 101 of SEC Regulation M and the basis for such determination, including the contemplated date and time of the commencement of the restricted period, the listed security name and symbol, and identification of the distribution participants and affiliated purchasers, no later than the business day prior to the first complete trading session of the applicable restricted period, unless later notification is necessary under specific circumstances;
- the pricing of the distribution, including the listed security name and symbol, the type of security, the number of shares offered, the offering price, the last sale

before the distribution, the pricing basis, the SEC effective date and time, the trade date, the restricted period, and identification of the distribution participants and affiliated purchasers, no later than the close of business the next business day following the pricing of the distribution, unless later notification is necessary under specific circumstances; and

- the cancellation or postponement of any distribution for which prior notification of commencement of the restricted period has been submitted under paragraph (c)(1)(A), immediately upon the cancellation or postponement of such distribution. If no ETP Holder is acting as a manager (or in a similar capacity) of such distribution, then each ETP Holder that is a distribution participant or affiliated purchaser shall provide the notice required under paragraph (c)(1), unless another ETP Holder has assumed responsibility in writing for compliance therewith.

Proposed NYSE Arca Equities Rule 5190 is substantially similar to FINRA Rule 5190, except that the term “member” has been replaced with “ETP Holder” and “stabilizing bids” have been added to the proposed rule, which is consistent with NYSE Rule 5190(e) and NYSE Amex Equities Rule 5190(e). The Exchange notes that proposed NYSE Arca Equities Rule 5190(e) incorporates the concepts currently set forth in NYSE Arca Equities Rule 5.2(b)(1)(B).

Consistent with current practice that notifications “to the Exchange” are submitted directly to FINRA, notification under proposed NYSE Arca Equities Rule 5190 may be satisfied via third-party data communication facilitators or emailed directly to FINRA’s Regulatory Trading Official Desk at [secondaryofferings@finra.org](mailto:secondaryofferings@finra.org). Further, because

notifications submitted pursuant to FINRA Rule 5190 or NYSE Rule 5190 will meet the requirements of NYSE Arca Equities Rule 5190, such notifications will also satisfy the notification requirements of NYSE Arca Equities Rule 5190.<sup>7</sup> ETP Holders, therefore, need not make duplicative filings to the Exchange if notifications have been submitted to FINRA pursuant to NYSE or FINRA rules.

## 2. Statutory Basis

The proposed rule change is consistent with the Act,<sup>8</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>9</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange believes that the proposed rule change supports the objectives of the Act by providing greater harmonization between NYSE Arca Equities Rules and FINRA Rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance for dual members of both SROs. To the extent the Exchange has proposed changes that differ from the FINRA version of the rules, such changes are technical in nature and do not change the substance of the proposed NYSE Arca Equities rules.

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<sup>7</sup> On June 14, 2010, FINRA and the Exchange entered into a Regulatory Services Agreement that sets forth, pursuant to the Statement of Work, certain regulatory services including surveillance and investigation functions.

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>10</sup> and Rule 19b-4(f)(6) thereunder.<sup>11</sup> Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>12</sup> and Rule 19b-4(f)(6)(iii) thereunder.<sup>13</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become

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<sup>10</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>11</sup> 17 CFR 240.19b-4(f)(6).

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>13</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),<sup>14</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would reduce redundancies associated with Regulation M filings. This reduces unneeded regulatory burdens on members and may help ease review of these filings. For these reasons, the Commission designates the proposed rule change as operative immediately upon filing with the Commission.<sup>15</sup>

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form

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<sup>14</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>15</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).



(<http://www.sec.gov/rules/sro.shtml>); or

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEARCA-2012-07 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEARCA-2012-07. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549-1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at [www.nyse.com](http://www.nyse.com). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit

only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEARCA-2012-07 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

Kevin M. O'Neill  
Deputy Secretary

[FR Doc. 2012-2833 Filed 02/07/2012 at 8:45 am; Publication Date: 02/08/2012]

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<sup>16</sup> 17 CFR 200.30-3(a)(12).